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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DANIEL O'DONNELL, Plaintiff and Appellant, v. THOMAS ALLEN et al., Defendants and Respondents.	B213420 (Los Angeles County Super. Ct. No. NC034977)

APPEAL from judgments of the Superior Court of Los Angeles County. Roy L. Paul, Judge. Reversed in part and affirmed in part.

Law Offices of Martin L. Stanley, Martin L. Stanley and Jeffrey R. Lamb for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, James J. Kjar and Albert E. Cressey III for Defendant and Respondent Thomas P. Allen III.

Law Office of J. Douglas Post and J. Douglas Post for Defendants and Respondents Major Langer, Ronald Beck and Perona, Langer, Beck, Lallande & Serbin.

Plaintiff and appellant Daniel O'Donnell (plaintiff) appeals separate summary judgments entered in favor defendant and respondent Thomas Allen (Allen), and in favor of defendants and respondents Major Langer (Langer), Ronald Beck (Beck), and the law firm of Perona, Langer, Beck, Lallande & Serbin (the Perona firm),[1] in plaintiff's action for legal malpractice and breach of fiduciary duty. We reverse the judgment as to Allen and affirm the judgment as to the Perona defendants.

BACKGROUND

1. The Underlying Personal Injury Action

On October 30, 2000, plaintiff sustained catastrophic injuries at his place of employment when a shipping container slipped from a flatbed truck, crushing plaintiff and requiring the amputation of both of his legs. The truck had been hired by plaintiff's employer, Nautilus Marine Protection, Inc. (Nautilus), but was operated by an uninsured subcontractor named Budd-Co.

After the accident, plaintiff's longtime domestic partner, Jamie Welch (Welch), called defendant Allen, a sole practitioner attorney who had previously handled a workers' compensation matter for her. Allen in turn called Thomas Stolpman (Stolpman), a well-known trial attorney experienced in handling harbor related claims. Allen believed Stolpman's law firm was more capable of handling both the workers' compensation and the personal injury aspects of plaintiff's case and he arranged a meeting with Welch and Stolpman in plaintiff's hospital room on November 17, 2000.

At the November 17, 2000 meeting, plaintiff signed a retainer agreement with both Stolpman and Allen. After the retainer agreement was signed, Stolpman, Allen, and Welch went to view the accident scene.

On May 8, 2001, Stolpman filed a personal injury action on plaintiff's behalf against Budd-Co. Allen was not listed as plaintiff's counsel of record on the complaint or in any subsequent pleadings, nor was he listed on any proofs of service.

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[1] Beck, Langer, and the Perona firm are referred to collectively as the Perona defendants.

As the litigation progressed, plaintiff found that while Stolpman was very difficult to contact, he could easily reach Allen. When plaintiff called Allen, Allen was able to induce Stolpman to return plaintiff's telephone calls. Plaintiff would sometimes telephone Allen to inquire about the status of the case. Allen would respond that he did not have the case in front of him and that he would look into it. Plaintiff would then receive a call back from Stolpman to discuss the case. Plaintiff also discussed with Allen the legal theory of gross negligence, and Allen explained that the theory is difficult to prove and requires intentional conduct. Plaintiff also discussed this and other legal theories with Stolpman.

In November 2002, Stolpman negotiated with counsel for Buddy Lee Smithers, individually and doing business as Budd-Co, a stipulation for entry of judgment in the amount of $10 million, a covenant not to execute on the judgment, and an assignment of Budd-Co's rights against Nautilus's insurer, Everest Indemnity Insurance Company (Everest). The stipulated judgment was premised on Smithers's representation that he was the owner and driver of the truck involved in plaintiff's accident.

By this time, plaintiff had become dissatisfied with Stolpman and began looking for new counsel. Plaintiff was ultimately referred to defendant Langer, with whom he met in late November 2002, after the trial date in the Budd-Co action had been vacated. Plaintiff asked Langer to take over the Budd-Co action and to represent him in a legal malpractice action against Stolpman. Langer agreed only to pursue a bad faith claim against Everest, and confirmed the scope and terms of the Perona defendants' representation in a written retainer agreement and a letter agreement dated November 27, 2002, both of which were signed by plaintiff.

The Perona defendants negotiated an increase in the amount of the stipulated judgment against Budd-Co from $10 million to $15 million, and redrafted the stipulated judgment, making it contingent upon a finding that it was a good faith settlement. On December 11, 2002, the Perona defendants substituted into the personal injury action as plaintiff's counsel of record to file a motion for a good faith settlement determination pursuant to Code of Civil Procedure section 877.6.

The good faith settlement motion was continued several times, in part because plaintiff had concerns as to whether Everest was the proper insurance carrier, and in part because of concern that a monetary recovery in a civil action might cause plaintiff to forfeit his workers' compensation benefits. To allay plaintiff's concerns about Everest, defendant Beck investigated the matter further by consulting with an insurance broker, who confirmed that Everest was the correct insurance company. The good faith settlement motion was granted on June 30, 2003.

2. The Insurance Bad Faith Action

In November 2003, the Perona defendants filed an action against Everest on behalf of plaintiff as Budd-Co's assignee for bad faith refusal to defend Budd-Co in plaintiff's personal injury action. The bad faith action against Everest proceeded to trial, and plaintiff obtained a $15 million judgment in his favor. This court reversed the judgment, finding that Budd-Co was not an insured under the Everest policy and that accordingly, there had been no breach of the duty to defend. (*Daniel O'Donnell v. Everest National Insurance Company* (Jul. 10, 2007, B186428) [nonpub. opn.].)

3. The Instant Legal Malpractice Action

Plaintiff filed this legal malpractice action against Stolpman and his law firm in November 2003, subsequently amending the complaint to add Allen and the Perona defendants.

In March 2004, plaintiff's counsel in this malpractice action sent a letter to the Perona defendants stating that the Perona defendants could easily have added as "Doe" defendants any appropriate defendants who were not known to plaintiff at the time the Budd-Co action was filed. In response, the Perona defendants named John Smithers[2] as a Doe defendant and served him on April 22, 2004. The trial court in the Budd-Co action on its own motion dismissed the Doe amendment of John Smithers.

Plaintiff's third amended complaint alleged that all of the defendants were professionally negligent by failing to discover that John Smithers, not Buddy Lee

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[2] John Smithers is the father of Buddy Lee Smithers.

Smithers, was the driver of the Budd-Co truck involved in plaintiff's accident, and by failing to join John Smithers and other potentially responsible parties as defendants in the personal injury action. Plaintiff further alleged that the Perona defendants breached fiduciary duties owed to him by refusing to represent him in the malpractice action against Stolpman; refusing to represent him in the Budd-Co action; disclosing to Stolpman that plaintiff was pursuing a malpractice case against him; pursuing frivolous claims without plaintiff's authority by seeking to add John Smithers as a Doe defendant in the Budd-Co action after the malpractice lawsuit was filed; and intentionally or recklessly filing false documents in the Code of Civil Procedure section 877.6 motion stating that Buddy Smithers was the driver of the vehicle involved in plaintiff's accident.

Allen and the Perona defendants filed separate motions for summary judgment.[3]

Allen's Summary Judgment Motion

Allen's motion was premised on the theory that his professional relationship with plaintiff was limited to that of a referring attorney. Allen argued that he did no work on plaintiff's personal injury case, but merely referred the matter to Stolpman and facilitated communications between Stolpman and plaintiff.

In support of his motion, Allen submitted his own deposition testimony stating that he never intended to represent plaintiff in the personal injury action and that he felt "duty bound" to refer plaintiff to Stolpman, who was more qualified to handle the case. Allen further testified that he had never represented to plaintiff that he would act as plaintiff's attorney and that "[i]t was clearly understood" that Stolpman would be handling the case. Allen stated that he and Stolpman both signed the retainer agreement with plaintiff in order to disclose to plaintiff that Allen would share in any contingency fee recovery Stolpman obtained in the case. Allen further stated that he never participated with Stolpman's office in representing plaintiff, nor did he provide Stolpman with any input or advice concerning plaintiff's personal injury action.

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3 Stolpman is not a party to this appeal.

Allen's motion was also supported by Stolpman's declaration, stating that Allen had referred plaintiff's personal injury case to him, and that upon accepting the referral he anticipated paying Allen a modest portion of any contingent fee earned in the case. Stolpman's declaration further stated that he assumed complete control and management of the case, and that Allen performed no work and provided no assistance on the case and was never identified in any pleading or proof of service filed or served in the lawsuit.

Plaintiff opposed the motion, arguing that the terms of Allen's representation were set forth in the retainer agreement Allen signed, that Allen never limited the scope of the representation, and that plaintiff consulted with Allen from time to time on matters related to the lawsuit. Plaintiff submitted his own declaration, in which he stated that neither Allen nor Stolpman ever explained to him orally or in writing that their respective roles in handling the Budd-Co action were contrary to the terms of the retainer agreement. Plaintiff's declaration also stated that he would call Allen from time to time to discuss the status of the case and that Allen would respond that he did not have the case in front of him but that Allen would get back to him. Plaintiff further stated that he would discuss legal theories with Allen, and that he believed Allen was his attorney and was representing him in the lawsuit.

On September 25, 2008, the trial court heard and granted Allen's motion for summary judgment, on the ground that plaintiff failed to raise a triable issue of material fact as to whether the scope of Allen's relationship with plaintiff was anything other than that of a referring attorney and that there was no basis for direct or vicarious liability against Allen. Judgment was entered on November 25, 2008.

The Perona Defendants' Summary Judgment Motion

The Perona defendants argued that they owed plaintiff no duty in connection with the Budd-Co action because the scope of their representation was limited to the insurance bad faith action against Everest. They maintained that their involvement in the personal injury action was limited to obtaining a stipulated judgment against Budd-Co and a judicial determination that the settlement with Budd-Co was in good faith. The Perona

defendants argued that they undertook these limited tasks solely as a means of enforcing the stipulated judgment against Everest.

In support of their motion, the Perona defendants offered their retainer agreement and a separate letter agreement dated November 27, 2002, both signed by plaintiff. The letter agreement states in relevant part: "[T]his firm has agreed only to handle your case against Everest Indemnity Company. We have not agreed to furnish any legal advi[c]e concerning any other claims you may have against any other parties. Should you wish to seek legal advi[c]e against any other party you would have to seek other counsel." The retainer agreement states: "I hereby retain Perona, Langer, Beck & Lallande, a Professional Corporation ('Attorneys'), to represent me regarding [the] insurance case [against] Everest Indemnity Ins. Co."

The Perona defendants also submitted Langer's declaration recounting his November 2002 meeting with plaintiff, at which plaintiff had asked the Perona firm to represent him in a legal malpractice action against Stolpman and to reopen his personal injury action in order to pursue possible claims against the City and/or County of Los Angeles. Langer said he would not handle a malpractice action against Stolpman, nor was he interested in reopening the personal injury litigation, but that he would pursue an insurance bad faith claim against Everest for refusing to defend Budd-Co. Langer's declaration further stated that the retainer agreement and the November 27, 2002 letter agreement signed by plaintiff reflect that the Perona defendants'representation was limited to the insurance bad faith action against Everest.

Beck also submitted a declaration describing his work on the Everest case. In his declaration Beck stated that he discussed with plaintiff the procedure for enforcing the stipulated judgment against Everest. Beck told plaintiff that he would attempt to increase the amount of the stipulated judgment, and that the judgment would have to be approved by the court as a good faith settlement. Beck then negotiated an increase in the amount of the stipulated judgment against Budd-Co from $10 million to $15 million and filed a motion pursuant to Code of Civil Procedure section 877.6. The motion was continued several times, in part because plaintiff had concerns as to whether Everest was the proper

insurer. To address plaintiff's concerns, Beck had numerous discussions with an insurance broker, who provided a letter stating that Everest was the correct carrier. After showing plaintiff the letter, plaintiff agreed to go forward with the good faith motion.

Plaintiff offered his own declaration in opposition to the summary judgment motion. Plaintiff's declaration states that the Perona defendants "agreed to take over my personal injury case and worked on that case and represented me in that regard." Plaintiff's declaration further states that he did not authorize the Perona defendants to proceed with the motion for a good faith settlement determination and that he told them not to proceed with the motion.[4] Plaintiff argued that the Perona defendants breached their fiduciary duty by disregarding his express instructions not to proceed with the good faith motion.

On October 23, 2008, the trial court heard and granted the Perona defendants' motion for summary judgment, finding that plaintiff's causes of action for professional negligence and breach of fiduciary duty had no merit because the Perona defendants' engagement was limited to handling the insurance bad faith action against Everest. The trial court concluded that the Perona defendants had no duty to pursue causes of action or claims in the underlying personal injury action against Budd-Co. Judgment was entered on November 7, 2008.

DISCUSSION

I. Standard of Review

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the

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[4] Plaintiff also submitted the declaration of an expert who opined that the Perona defendants were professionally negligent in several respects. The trial court sustained the Perona defendants' evidentiary objections to nearly the entire declaration, and plaintiff does not challenge the evidentiary rulings in this appeal.

plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).)

If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Aguilar, supra,* 25 Cal.4th at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

II. A Triable Issue of Material Fact Exists as to the Scope of Allen's Representation

Plaintiff contends the summary judgment entered in Allen's favor must be reversed because a triable issue of material fact exists concerning the scope of Allen's professional relationship with plaintiff. The starting point for resolution of this issue is the retainer agreement between Allen and plaintiff, to which we apply the following rules of contract interpretation: "'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.' (Civ. Code, § 1638.) 'When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . .' (Civ. Code, § 1639.)" (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709 (*WYDA Associates*).)

A threshold inquiry in contract interpretation is whether the contract is ambiguous. (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.) An ambiguity exists when a contractual provision is capable of more than one reasonable interpretation. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 73.) If an

ambiguity exists, parol evidence is admissible to aid in the interpretation of the contract. (*Appleton v. Waessil, supra*, at p. 554.) A two-step process is employed in deciding whether parol evidence is admissible. First, "the proffered material regarding the parties' intent" is reviewed to determine "if the language is 'reasonably susceptible' of the interpretation urged by a party. [Citation.] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract. [Citation.]" (*Ibid*.) "Further, parol evidence is admissible only to prove a meaning to which the language is 'reasonably susceptible' [citation], not to flatly contradict the express terms of the agreement. [Citation.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167.) "[P]arol evidence of *unspoken subjective intent* is irrelevant to contract interpretation." (*Great American Ins. Co. v. Superior Court* (2009) 178 Cal.App.4th 221, 239, fn. 22; accord, *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.* (1992) 8 Cal.App.4th 338, 346.)

"The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. [Citation.] Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' [Citation.]" (*WYDA Associates, supra,* 42 Cal.App.4th at p. 1710.)

The retainer agreement between Allen and plaintiff states in relevant part: "I, DANIEL JOSEPH O'DONNELL, do hereby employ and retain *THE LAW OFFICES OF STOLPMAN, KRISSMAN, ELBER, et al., and THOMAS P. ALLEN III, A PROF. CORP.* (hereafter 'attorneys'), to institute legal proceedings or any other procedure said attorneys deem appropriate on behalf of me against BUDDCO and other proper defendants, to recover damages sustained by me on or about the 30th day of October, 2000, as a result

of a container falling upon me . . . ." The agreement expressly excludes any workers' compensation claim: "I understand that said attorneys will not handle any workers compensation claim which I may have, and that I should seek the legal services of a workers compensation specialist."

The trial court impliedly found the retainer agreement to be ambiguous and admitted parol evidence to aid in its interpretation. The trial court then interpreted the agreement to limit Allen's professional relationship with plaintiff to that of a referring attorney.

The trial court's admission of parol evidence contradicting the express terms of the retainer agreement was error, as was its interpretation of the agreement. The language of the retainer agreement is not "reasonably susceptible" to the interpretation urged by Allen and adopted by the trial court. (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1165.) The retainer agreement states that plaintiff retained Allen "to institute legal proceedings" against Budd-Co and "to recover damages" plaintiff sustained as a result of his accident. Allen's proffered evidence -- that the parties never intended him to serve as plaintiff's legal counsel in the Budd-Co action -- flatly contradicts the express language of the agreement and was inadmissible for that purpose. (*Winet v. Price*, at p. 1167.) There was no evidence that Allen communicated to plaintiff Allen's intent to limit his role to that of a referring attorney. Evidence of Allen's unspoken subjective intent regarding the scope of his representation was not relevant to the interpretation of the retainer agreement. (*Great American Ins. Co. v. Superior Court, supra*, 178 Cal.App.4th at p. 239, fn. 22.)

The evidence concerning the scope of Allen's representation was also conflicting. Plaintiff presented evidence that he relied on Allen as his attorney; called Allen to inquire about the status of the case; and discussed with Allen potential legal theories such as gross negligence. This evidence contradicts the evidence presented by Allen that the parties "understood" his role to be limited to that of a referring attorney. The conflicting evidence gives rise to a factual question concerning the scope of Allen's representation,

precluding summary judgment. (*WYDA Associates, supra*, 42 Cal.App.4th at p. 1710.) The trial court accordingly erred by granting summary judgment in Allen's favor.

III. Summary Judgment Was Properly Granted as to the Perona Defendants

Plaintiff contends the trial court erred by finding that the Perona defendants' duty was limited by the terms of their retainer agreement to representing plaintiff in the bad faith action against Everest. Plaintiff maintains that by substituting into the Budd-Co action for the purpose of obtaining a stipulated judgment against Budd-Co and judicial approval of the stipulated judgment under Code of Civil Procedure section 877.6, the Perona defendants became plaintiff's attorneys for all purposes and without limitation in that action. Plaintiff claims the Perona defendants were professionally negligent by failing to pursue claims against John Smithers and other possible defendants in the Budd-Co action, and by failing to advise him with regard to these potential claims and defendants.

Plaintiff further contends there is a conflict in the evidence concerning his breach of fiduciary duty cause of action. He argues that his own declaration contradicts that of Beck with regard to the Perona defendants' authorization to proceed with the good faith settlement motion, giving rise to a triable issue of material fact, precluding summary judgment.

A. Professional Negligence

"In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citations.]" (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) The central issue presented here is the existence and scope of the Perona defendants' duty.

The retainer agreement signed by the Perona defendants and by plaintiff is the starting point for determining the scope of the duty the Perona defendants owed to plaintiff. That agreement states in relevant part: "I hereby retain Perona, Langer, Beck &

Lallande, a Professional Corporation ('Attorneys'), to represent me regarding [the] insurance case [against] Everest Indemnity Co." The agreement expressly excludes any workers' compensation claim: "Client also acknowledges that Attorneys will not handle any workers' compensation claim or social security benefits claim that may be related to the accident or injury. If Client desires to have legal representation in these areas, Attorneys will assist the Client by referral to a qualified specialist for the handling of such claims."

The November 27, 2002 letter agreement signed by the parties is also relevant. In that letter, plaintiff acknowledged that the Perona firm "agreed only to handle your case against Everest Indemnity Company. We have not agreed to furnish any legal advi[c]e concerning any other claims you may have against any other parties. Should you wish to seek legal advi[c]e against any other party you would have to seek other counsel."

The language of these documents is clear and explicit regarding the scope of the Perona defendants' representation. Their representation did not encompass the Budd-Co action or any potential claims or possible defendants in that action. (Civ. Code, § 1639; *WYDA Associates, supra*, 42 Cal .App.4th at p. 1709.) The Perona defendants accordingly met their burden of establishing that they owed no duty to plaintiff to investigate potential claims or defendants in the Budd-Co action or to advise plaintiff regarding such potential claims or defendants.

Plaintiff failed to raise any triable issue of fact regarding the scope of the Perona defendants' duty. The declaration he submitted stating that the Perona defendants "agreed to take over my personal injury case," was inadmissible to alter the express terms of the parties' written contract. (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1167.)

Plaintiff also failed to raise a triable issue as to whether the Perona defendants expanded the scope of their representation by substituting in as counsel of record in the Budd-Co action. The undisputed evidence shows that the Perona defendants appeared in the Budd-Co action for the sole purpose of ensuring that the stipulated judgment obtained against Budd-Co would be enforceable against Everest. (See *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 528 [in a bad faith action premised on refusal to defend,

a settlement is prima facie evidence of insured's liability on an underlying claim if the insured obtains a good faith determination under Code of Civil Procedure section 877.6].) There was no evidence that the Perona defendants agreed to reopen the Budd-Co action, in which a settlement had been reached and the trial date vacated. The Perona defendants owed no duty to pursue other claims or potential defendants in the Budd-Co action, or to advise plaintiff concerning such claims or defendants.

B. Breach of Fiduciary Duty

"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence. [Citations.] The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

Plaintiff contends a triable issue of fact exists as to whether the Perona defendants breached their fiduciary duty by disregarding his express instructions not to proceed with the motion for good faith settlement. As alleged in the third amended complaint, plaintiff's cause of action for breach of fiduciary duty against the Perona defendants was based solely on the following facts: (a) the alleged disclosure to Stolpman that plaintiff was "shopping" a legal malpractice action against him; (b) without plaintiff's authorization, filing and serving in the Budd-Co action a Doe amendment to the complaint, a request for default, and a motion for reconsideration of the stricken Doe amendment; (c) failing to represent plaintiff in the Budd-Co action against John Smithers and other defendants; and (d) intentionally or recklessly filing false declarations stating that Buddy Lee Smithers was the owner of Budd-Co when they knew or reasonably should have known that John Smithers was the driver of the truck.[5] The third amended

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[5] Plaintiff has not challenged the trial court's ruling on the breach of fiduciary duty cause of action as it relates to the Doe amendment, the refusal to represent him in the Budd-Co action, the refusal to undertake a malpractice action against Stolpman, disclosing to Stolpman that plaintiff was pursuing a malpractice claim against him, or intentionally and recklessly filing false documents in the good faith settlement motion.

complaint contains no allegation that the Perona defendants breached their fiduciary duty by disregarding plaintiff's instructions not to proceed with the motion for a good faith settlement determination. It is well settled that a defendant moving for summary judgment need only negate the theories of liability that are alleged in the complaint and that a plaintiff may not defeat summary judgment by advancing a new, unpleaded theory of liability. "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, fn. 4.) Plaintiff cannot rely on an unpleaded theory of liability as the basis for defeating summary judgment.

Even if plaintiff had properly pleaded a breach of fiduciary duty claim premised on lack of authority to proceed with the good faith settlement motion, the evidence he presented in opposition to the motion for summary judgment raises no triable issue of material fact. Plaintiff claims there is a conflict in the evidence, specifically, between his declaration and that of defendant Beck that precludes summary judgment.

Plaintiff's declaration states in relevant part:

> "9. I did not authorize the Perona defendants to proceed with the motion for good faith settlement, and after careful thought and consideration told them not to proceed with the motion. I felt there were significant discrepancies that needed to be corrected, including whether the proper defendants were named and whether the correct insurance policies were being pursued.
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> "10. I wrote a letter, which I delivered to my counsel Mr. Beck of the Perona firm when we were in court, stating: 'YOUR HONOR: I DANIEL O'DONNELL, AM RESPECTFULLY REQUESTING A CONTINUANCE IN MY CASE. DUE TO LACK OF DISCOVERY AND INSUFFICIENT INFORMATION ON THE INSURER; ALONG WITH OTHER DISCREPANCIES IN POLICY NUMBERS, NAMES, AND DATES. THERE ARE UNANSWERED QUESTIONS WHICH I FEEL ARE VITAL TO MAKING A DECISION EFFECTING THE REST

He has therefore forfeited all of these claims on appeal. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466.)

> OF MY LIFE. I NEED A COPY OF THE POLICY. I HAVE BEEN TRYING TO GET IT FOR OVER A YEAR, AS YOU CAN SEE BY THE ATTACHED LETTERS. CAN YOU HELP ME GET A COPY OF THE POLICY THAT WAS IN EFFECT AT THE TIME OF MY ACCIDENT? I JUST NEED SOME FACTS IN ORDER TO MAKE SUCH AN IMPORTANT DECISION. THANK YOU SO MUCH FOR YOUR TIME. RESPECTFULLY, DANIEL O'DONNELL.'"[6]

Plaintiff argues that "[a]s a result of the letter, Perona had a duty NOT to file the stipulated judgment and instead to further investigate as requested by the client." He suggests that the duty to investigate included determining whether John Smithers or others should have been added as defendants in the Budd-Co action. The terms of the parties' retainer agreement forecloses the existence of any such duty. As discussed, the Perona defendants limited the scope of their representation to the bad faith action against Everest. Their engagement letter expressly excluded "any other claims you may have against any other parties."

There is no corroboration for the claim that plaintiff instructed the Perona defendants to withdraw the good faith settlement motion. Plaintiff's April 9, 2003 letter does not instruct the Perona defendants to withdraw the good faith settlement motion. The letter is not directed to the Perona defendants at all, but to the trial court in the Budd-Co action, and it requests a continuance of the motion, not that the motion be vacated. The letter states that plaintiff's reason for seeking a continuance is his concern about "insufficient information on the insurer" and discrepancies in the insurance policies. The letter expresses no concern about the identity of the defendants in the Budd-Co action. Plaintiff's own declaration precludes him from asserting that he expressed any such concern while the good faith motion was pending. The good faith motion was granted on June 30, 2003, and plaintiff's declaration states that he did not learn of John Smithers's identity until October 2003. There is no evidence that plaintiff expressed any concern

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6 A copy of plaintiff's letter, dated April 9, 2003, was included in the appellate record.

about potential defendants in the Budd-Co action while the good faith settlement motion was pending.

There is no material conflict in the evidence. Consistent with plaintiff's April 9, 2003 letter, Beck's declaration states that the motion for good faith settlement was continued because plaintiff "had concerns as to whether Everest was the correct carrier." To allay these concerns, Beck investigated the matter further and obtained a letter from an insurance broker confirming that Everest was the correct insurance carrier. Beck's declaration states that he showed the insurance broker's May 22, 2003 letter to plaintiff, who "then agreed to go forward with the motion for good faith settlement to get the stipulated judgment approved, and to proceed against Everest." Beck's declaration further states: "After I showed Mr. O'Donnell the May 22, 2003 letter, he never told me to stop the process, withdraw the motion for good faith settlement, or that he did not want to go forward with the case against Everest." Plaintiff offered no evidence of any objection to the good faith motion after his April 9, 2003 request for a continuance.

The trial court did not err by concluding that plaintiff failed to raise a triable issue of material fact as to whether the Perona defendants were professionally negligent or breached any fiduciary duty to plaintiff.

DISPOSITION

The judgment is reversed as to Allen and affirmed as to the Perona defendants. Plaintiff is awarded his costs in appealing the judgment entered in favor of Allen. The Perona defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST